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ROBERT S. CA[illegible]

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PANHANDLE EASTERN [illegible]

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ROBERT S. CALVERT, [illegible]

A[illegible]

APPEALS BY EACH APPELLANT FROM [illegible]

COURT OF TEXAS AND THE COURT [illegible]

THE THIRD SUPREME JUDICIAL [illegible]

JOINT BRIEF FOR A[illegible]

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SUBJECT INDEX

TABLE OF CASES CITED

STATUTES AND OTHER AUTHORITIES CITED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

Nos. 198, 199

MICHIGAN-WISCONSIN PIPE LINE COMPANY,
Appellant,

vs.

ROBERT S. CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL.,
Appellees.

Nos. 200, 201

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

vs.

ROBERT S. CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL.,
Appellees.

APPEALS BY EACH APPELLANT FROM BOTH THE SUPREME COURT OF TEXAS AND THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

JOINT BRIEF FOR APPELLANTS

Preliminary Statement

This brief is filed jointly by Michigan-Wisconsin Pipe Line Company (Michigan-Wisconsin), appellant in Nos. 198 and 199, and Panhandle Eastern Pipe Line Company (Panhandle), appellant in Nos.

200 and 201. The appeals in Nos. 198 and 199 are identical except that 198 is from the Court of Civil Appeals for the Third Supreme Judicial District of Texas and 199 is from the Supreme Court of Texas. Nos. 200 and 201 which are appeals by Panhandle are also identical except that 200 is from the Court of Civil Appeals and 201 is from the Supreme Court.

Appeals were taken from both Courts because counsel were uncertain, in view of one of the provisions of the Texas Rules of Civil Procedure, whether the Supreme Court of Texas or the Court of Civil Appeals is "the highest court of a state in which a decision could be had" within the meaning of Title 28, U.S.C., Sec. 1257. Consideration of this procedural question of jurisdiction was, by this Court, postponed to hearing on the merits. The question is discussed in this brief at pages 58 to 61 under the heading "The Jurisdictional Question."

In the trial court, the two cases now on appeal were tried on separate stipulations of fact and the testimony of one witness, which was admitted in both cases. The stipulations were identical in substance except as they described in detail the operations of the respective appellants. While the cases were not consolidated in the state courts, judgments identical in form were entered in each case by the trial court, and both cases were decided by the Court of Civil Appeals in one opinion. The same question of law is presented by both appeals. Believing that a consolidated record will be more convenient than separate records in consideration of the issue involved, counsel for appellants and appellees have stipulated as to

the content of the consolidated record that has been printed.[1]

Opinion Below

Neither the trial judge nor the Supreme Court of Texas filed an opinion. The opinion of the Court of Civil Appeals (R. 34) is reported at 255 S.W. 2d 535.

Jurisdiction

Appellants' applications for writs of error to the Court of Civil Appeals were refused by the Supreme Court of Texas on May 6, 1953, and motions for rehearing were denied by that Court on June 3, 1953 (R. 59 and 60). Petition for appeal to this Court in each case was presented to and allowed by the Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas on June 25, 1953 (R. 259 and 265). On that same date petition for appeal in each case was presented to and allowed by the Chief Justice of the Supreme Court of Texas (R. 262 and 267).

By these appeals the validity of a statute of the State of Texas is drawn in question on the ground of its being repugnant to the Constitution of the United States and the final decision below was in favor of its validity. The jurisdiction of this Court

[1] *Amarillo Oil Company v. Calvert et al*, mentioned in the opinion of the Court of Civil Appeals, also was a companion case to the suits by Michigan-Wisconsin and Panhandle in the state courts. The operations of Amarillo Oil Company, however, are exclusively intrastate in character. The Supreme Court of Texas has withheld action on the motion for rehearing in its case pending this appeal (R. 61).

on appeal is conferred by Title 28, U.S.C., Section 1257 (2).

The Question Presented

Whether a so-called occupation tax imposed by the State of Texas upon interstate natural gas pipeline companies for the privilege of receiving gas into their pipelines within the state for immediate transportation in interstate commerce, and measured by the volumes of gas so received into such pipelines, may stand consistently with the Commerce Clause (Art. I, Sec. 8, Cl.3) of the Constitution of the United States.

Statute Involved

H. B. 285, Chapter 402, page 740, Acts of the 52nd Legislature of Texas (1951), is an "omnibus" tax bill containing provisions relating to taxes of many kinds, only one section of which—Section XXIII of the Act[2]—is here involved. A copy of Section XXIII is attached hereto as an Appendix, and the portions that are of special significance here, Subsection 2 and the second sentence of Subdivision (c) of Subsection 1, are now quoted:

Subsection 2 is as follows: (Omitting certain exemptions therein contained that are not here pertinent.)

"In addition to all other licenses and taxes levied and assessed in the State of Texas, there is hereby levied upon every person engaged in gathering gas

[2] Article 7057f, Vernon's Annotated Civil Statutes of Texas (V.A.C.S.).

produced in this State, an occupation tax for the privilege of engaging in such business, at the rate of 9/20 of one cent per thousand (1,000) cubic feet of gas gathered."

The second sentence of Subdivision (c) of Subsection 1 of such Section XXIII is as follows:

"In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term 'gathering gas' means the first taking or the first retaining of possession of such gas for other processing or transmission, whether through a pipeline, either common carrier or private, or otherwise, after such gas has passed through the outlet of such plant."

Statement of the Cases

(1) *Nature and History of the Cases*

Separate suits were brought by appellants against the appropriate Texas state officials, appellees herein, in a state district court under the provisions of Article 7057b of Vernon's Annotated Civil Statutes (V.A.C.S.). In its action, each appellant sought a determination that Section XXIII of H. B. 285 is invalid insofar as the statute applies to its operations and sought the recovery of moneys it had theretofore paid and would thereafter pay during pendency of the action, on the ground that the so-called "gathering tax" imposed by Section XXIII of H. B. 285 is violative of the Commerce Clause of the United

States Constitution (Article I, Section 8, Clause 3), as applied to its operations.[3]

The district court held that Section XXIII is invalid under the Commerce Clause as to gas "gathered" (as that term is defined in the Act) for immediate interstate transportation. Since all of the gas so "gathered" by the respective appellants (with insignificant exceptions in the case of Panhandle) does move immediately and directly in interstate commerce, that court entered judgment in favor of Michigan-Wisconsin and Panhandle, respectively, for all of the taxes paid by them prior thereto (R. 28 and 31).

Upon appeal by appellees to the state Court of Civil Appeals, that court entered separate judgments reversing the judgments of the district court (R. 55 and 55). Appellants duly applied to the Supreme Court of Texas for writs of error, but that court refused such applications and subsequently denied motions for rehearing (R. 59 and 60). Appellants' petitions for appeal, with appropriate accompanying documents, were filed in this Court on July 23, 1953.

(2) *Nature of Michigan-Wisconsin's Operations*

Michigan-Wisconsin is a natural gas pipeline company holding certificates of convenience and neces-

[3] The petitions of the respective appellants were amended from time to time, in accordance with the requirements of the statute, for the purpose of setting up additional payments made under protest subsequent to the filing of the next preceding petitions. The fourth amended petitions filed by appellants (R. 1 and 11) showed the total sums that each had paid under protest through June of 1952.

sity issued by the Federal Power Commission under the Natural Gas Act, 15 U.S.C. Sec. 717, et seq. (R. 103). It owns and operates a pipeline transportation system which originates in the Panhandle of Texas, less than two miles from the Oklahoma state line, and terminates at various points in the States of Michigan and Wisconsin. At these points, and at other points in Missouri and Iowa, it sells natural gas to local distribution companies which serve domestic and industrial consumers in those areas. Its sole business is the interstate purchase, transportation and sale of natural gas. It produces no gas in Texas, gathers (in the real meaning of the word) no gas in Texas, and sells no gas in Texas (R. 104).

All the gas transported by Michigan-Wisconsin is purchased by it from Phillips Petroleum Company under a long term contract. Phillips owns and operates a network of gathering lines through which it brings gas from individual wells or groups of wells to its gasoline plant located adjacent to the inlet of Michigan-Wisconsin's pipeline in Hansford County, Texas. At this plant certain liquefiable hydrocarbons (gasoline and other liquid products) are removed from the gas by Phillips, and remain the property of Phillips (R. 105-109).

The remaining natural gas, known technically as "residue gas," (R. 103) then flows from the absorbers in the Phillips gasoline plant through pipes owned by Phillips a distance of 300 yards to the boundary between the property owned by that company and that of Michigan-Wisconsin. There, without any break in the flow, the gas is metered and enters the interstate pipeline system owned by Michi-

gan-Wisconsin (R. 109). It is at *this* point of entrance into Michigan-Wisconsin's pipeline that title to the gas passes from Phillips to Michigan-Wisconsin, and it is *this* "taking" or receiving of gas by the latter into its pipe line for immediate interstate movement which the statute here involved designates as the taxable incident.

Following the receipt by Michigan-Wisconsin of the residue gas, such gas flows through Michigan-Wisconsin's facilities a short distance to Michigan-Wisconsin's compressor station, where, by raising the pressure of the gas, Michigan-Wisconsin utilizes the expansion characteristics of the gas as the motive power for further movement along its journey[4] (R. 109). From the compressor station in Texas, the gas flows through Michigan-Wisconsin's pipeline system 1.74 miles to the Oklahoma border, and thence to consumer markets in other states. Additional motive power for this journey is furnished by 15 other compressor stations which are operated by Michigan-Wisconsin in other states through which the gas is transported (R. 104). It was stipulated by the parties (R. 110), and the Court of Civil Appeals found:

"The movement of such gas from the producing wells to points of delivery to Michigan-Wisconsin at the outlet of the Phillips gasoline plant and thence through pipe lines to consumers in Michigan and Wisconsin is a steady and continuous flow. The tak-

[4] A schematic diagram of the operations just described is attached as Appendix B to the opinion of the Court of Civil appeals (R. 54B), 255 S.W. 2d at 548.

ing of such gas at the outlet of the gasoline plant is accomplished through facilities owned by Michigan-Wisconsin and used exclusively by it in the taking and transportation of such gas.

"All of the gas is purchased by Michigan-Wisconsin for transportation to points outside Texas, and all of such gas is in fact so transported" (R. 39) 255 S.W. 2d at 539.

(3) Nature of Panhandle's Operations

The Court of Civil Appeals recognized in its opinion that, except for minor variations, Panhandle conducts its operations as does Michigan-Wisconsin (R. 40). Panhandle is a natural gas pipeline company, holding certificates of convenience and necessity issued by the Federal Power Commission under the Natural Gas Act, 15 U.S.C., Sec. 717, et seq. (R. 65). Its main pipeline originates near the east boundary of Moore County, Texas, extends thence through portions of the States of Texas, Oklahoma, Kansas, Missouri, Illinois, Indiana and Ohio, and has its northern termini in the State of Michigan (R. 66). It "takes or retains," within the meaning of Section XXIII of H.B. 285, gas into such pipeline at the outlets of three gasoline plants, namely, the Phillips Sneed gasoline plant, the Shamrock McKee gasoline plant and the Phillips Hansford gasoline plant.[5]

Panhandle sells gas to three small customers in Texas in the amount of 146.3 m.c.f. daily which rep-

[5] A schematic diagram showing these points of taking possession of gas is attached as Appendix A to the opinion of the Court of Civil Appeals (R. 54A) 255 S.W. 2d at 547.

resents only .36 of 1 per cent of the total volumes of gas received into its main pipeline within the State of Texas. Except for those sales, Panhandle sells no gas in Texas from its pipeline, the southernmost point of sale being Kismet, Kansas (R. 66). The principal markets served by Panhandle include gas distribution companies and industrial consumers in the States of Missouri, Illinois, Indiana, Ohio, and Michigan. In the operation of its interstate pipeline transportation system, Panhandle owns and operates 18 compressor stations in various states (R. 66).

At the outlets of the Shamrock McKee gasoline plant and the Phillips Hansford gasoline plant, Panhandle "loads its interstate pipeline" (R. 71-72) with residue gas produced by Shamrock, Phillips and other producers. However, a portion of the gas which Panhandle takes at the Phillips Sneed gasoline plant is gas which Panhandle has produced in Texas, and which it has delivered to Phillips in order that, pursuant to contract between Panhandle and Phillips, the latter may extract liquefiable hydrocarbons (gasoline, etc.) therefrom (R. 68).

The movement of all the residue gas from the outlets of the gasoline plants through Panhandle's pipeline system to its customers in other states is a steady and continuous flow, and the taking of such gas at the outlets of the gasoline plants is accomplished by Panhandle through facilities that are used exclusively in connection with such taking, receiving and transportation (R. 83). When the residue gas enters Panhandle's interstate pipeline at the outlets of the gaso-

line plants, such gas is already committed by contract to sale and delivery to Panhandle for transportation to points in other states (except the small portion thereof which is sold within the State of Texas) (R. 73). The purpose of taking the gas at the outlets of the gasoline plants is solely for interstate transportation to markets in states other than in Texas; and the invariable practice of Panhandle necessarily is to transport such gas in interstate commerce.

The Court of Civil Appeals recognized (R. 40) that the function exercised by Panhandle as to the gas of which it takes possession at the outlets of the three gasoline plants for interstate transportation is the same function as that which is exercised by Michigan-Wisconsin as to the gas of which it takes possession at the outlet of the Phillips gasoline plant involved in Michigan-Wisconsin's case. For this reason, appellants will, in this brief, as did the Court of Civil Appeals in its opinion, use for purposes of illustration the factual situation of Michigan-Wisconsin.

(4) Conservation Laws and Regulations

Certain evidence, by stipulation and the testimony of a member of the Railroad Commission of Texas, was presented by appellees over objection of appellants, apparently to support a theory that "benefits, protection and opportunities" afforded the pipeline companies by the conservation laws and regulations of the State of Texas justify the tax in question. This argument, and the evidence relating thereto, are fully dealt with at pages 45 to 57 of this brief.

Specification of Error

Appellant in each case urges only one assignment of error. The error assigned by Michigan-Wisconsin in No. 198 (the appeal from the Court of Civil Appeals) is as follows:

"The Court of Civil Appeals erred in holding that Section XXIII of H.B. 285, Acts of the 52nd Legislature, is valid under the Commerce Clause (Art. I, Sec. 8, Cl. 3) of the Constitution of the United States, as applied to appellant's activities in taking possession of gas for the purpose of immediate transportation of such gas in interstate commerce, and in reversing the judgment of the District Court" (R. 260).

The error assigned by Michigan-Wisconsin in No. 199 is identical except that it refers to the action of the Supreme Court of Texas rather than to that of the Court of Civil Appeals (R. 263). The assignments of error by Panhandle in Nos. 200 and 201 (R. 266; 269) are identical with those of Michigan-Wisconsin in Nos. 198 and 199, respectively.

Summary of Argument

1. The only issue here is whether, notwithstanding the restrictions imposed by the Commerce Clause, the State of Texas may impose a tax (whatever it may be called) for the privilege of receiving gas into interstate pipelines for immediate transportation to other states. Because the supply of gas is concentrated so heavily in Texas and in a few other

states, a tax upon the receipt of such gas by interstate pipelines for such transportation to consumer states has a wide and burdensome impact.

2. The word "gathering" is used in the Act in a fictitious sense. That term has long been used in the gas and oil industry to mean the picking up of gas or oil by pipelines connected with individual wells in the field and assembling it at a common point. In the Act here involved, however, "gathering gas" is defined as meaning the taking possession of gas at the outlet of a gasoline plant for transportation through a pipeline. Thus, what the Texas Legislature did was to take a well-understood term and give it an artificial definition in the statute. At the time possession is taken by appellants, the natural gas has been produced, has been "gathered" in the real sense of the term, and has been separated into its marketable constituents of liquefied hydrocarbons and residue gas at a gasoline plant. It is after these processes have been completed, and at the point where the residue gas flows into appellants' pipelines, that the tax is imposed upon appellants for the privilege of "taking possession" of the residue gas "for transmission through a pipeline."

3. The Act is "furtively directed" at interstate commerce. It is clear, as shown by the legislative history, that the purpose of the Act was to "tax the pipeline gas that goes out of Texas and give as much protection as possible to Texas industries." Subsection 4 of the Act makes it impossible for any pipeline company to attempt by contract to shift the tax to the producer. The tax must, at all events, be borne by the pipeline companies, and, eventually, the con-

sumers. Moreover, it is expressly provided in Subsection 11 of the Act that if the tax levied thereby is held invalid, as applied to gas of which possession is taken for interstate transportation, the tax shall not be levied as to gas for intrastate consumption.

4. It cannot be said that the tax is one in the nature of a tax on property, or one in lieu of a property tax. The tax is not measured by, and has no relation to, the amount or value of property within the state. For receiving possession of the same volume of gas, Michigan-Wisconsin, which has less than two miles of pipeline within the state, must pay the same tax as does a pipeline company which has 500 miles of pipeline within the state.

5. Nor is the tax one in the nature of a charge for the use of facilities provided by the state, or to reimburse the state for expenses of inspection, supervision or regulation. Appellants do not use any facilities provided by the state, and the state imposes no supervision over or regulation of appellants' activities in transporting gas in interstate commerce.

6. The Act shows on its face that it is solely a tax for raising revenue. It provides that, except for 1/5 of 1 per cent allocated to cover the cost of employment of auditors and technical assistants to verify reports and determine whether the taxes are being properly reported or paid, the tax is to be apportioned 1/4 to the available school fund and the remaining 3/4 to the general revenue fund.

7. As applied to appellants, the amount of the tax is measured by and related mathematically to the volumes of gas transported in interstate com-

merce. The tax is thus imposed not only upon the activities of appellants in Texas but "upon the entire interstate commerce service rendered both within and without the state," *Gwin, White & Prince Inc. v. Henneford*, 305 U.S. 434, 439. If Texas may impose a tax upon pipelines for the "privilege" of "taking possession" of gas in Texas for transportation elsewhere, Oklahoma may also levy a tax, measured by the entire volumes of gas transported, for the "privilege" of "taking or retaining possession" of the same gas within that state—and so may each other state through which appellants' pipelines run. The tax thus "burdens the commerce in direct proportion to its volume." *Ibid.*

8. The "loading of a pipeline" for interstate transportation, like the loading of a ship or the loading of a train, is an inseparable, indivisible part of the transportation itself. The state has attempted to carve out of what is an integral or entire economic process, a particular phase or incident which it seeks to tax on the theory that such a phase is "separate and distinct" or "local."

9. Transportation in commerce at the least begins with the loading and ends with unloading. Both are essential parts of the transportation itself, *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90; *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422; *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196. The fact that the place of taking possession of gas is at the outlet of a gasoline plant within a state has no more significance than the fact that a carrier receives possession of wheat at the spout of an elevator, of cotton at the platform of a com-

press, of lumber at the outlet of a sawmill, or of automobiles at a loading ramp. If the theory of appellees were sustained, the inevitable result would be to open the flood gates for burdening interstate commerce in all commodities with "taking possession" taxes.

10. The instant cases show the ultimate in certainty and continuity of interstate movement. The movement of the gas from the points where it is "loaded" into appellants' interstate pipelines to appellants' markets in the states to which they transport gas is a steady and continuous flow. There is no storage involved, no break, no hesitation, but a continuous even movement into appellants' pipelines, and through such pipelines to points in other states. The interstate destinations of the gas are definitely fixed by (1) the physical location of the pipelines, (2) long term contracts and (3) appellants' certificates of public convenience and necessity.

11. Appellees' theory that the tax is justified by the circumstance that the State of Texas has adopted a policy of conserving oil and gas and apportioning production among producers, which it is claimed has conferred "benefits, protection and opportunities" upon appellants, is totally irrelevant to the question whether the tax contravenes the Commerce Clause of the Constitution. The "benefits, protection and opportunities" element is essential to a state's "jurisdiction to tax" under the Due Process Clause, but the question of the validity of a tax under the Commerce Clause "depends upon other considerations of constitutional policy having refer-

ence to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce," *Nippert v. Richmond*, 327 U.S. 416, 424.

12. Even if the "benefits, protection and opportunities" argument were relevant to these appeals, the facts demonstrate that the Texas oil and gas conservation and proration laws and regulations confer no special benefit upon appellants and were enacted for purposes unrelated to the business of appellants. Such laws show on their face, and it was expressly stipulated, that they were not designed to preserve the supply of gas of any particular purchaser for any particular time, but were only designed to prevent waste and to adjust correlative rights of all producers (R. 96). Reliance by appellees upon these laws and regulations thus represents an obvious and contrived attempt to find some justification, long after the statute was passed, for a severe and discriminatory tax upon interstate commerce itself.

ARGUMENT

I.

As Applied to Appellants, the Tax is Invalid since it is Imposed on the Privilege of Engaging in an Activity That is a Part of Interstate Commerce.

There is but one issue involved in this appeal: Whether the so-called "gathering tax" imposed by the State of Texas upon interstate transporters of natural gas for the *privilege* of receiving or "tak-

ing" gas into their pipelines for interstate transportation can stand consistently with the Commerce Clause of the Constitution. The facts are simple, the issue clear-cut. Because the supply of gas is concentrated so heavily in Texas and a few other states, a tax upon the receipt of such gas by interstate pipelines for transportation to the great majority of consumer states has a wide and important impact.

The validity of the statute here involved is to be determined from a consideration of the effect of such statute upon the great national purposes which the Commerce Clause was designed to accomplish. The origins of that clause are to be found, of course, in the commercial warfare between the thirteen original states which began after independence had been won. This Court recently quoted Mr. Justice Story to the effect that prior to the adoption of the Constitution

> ". . . each State would legislate according to its own interest, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view." Story, The Constitution, Sec. 259.

This came "to threaten at once the peace and safety of the Union." Id., Sec. 260.[6]

As will be shown below, the statute here under consideration was passed by the Texas legislature as a result of a frank and open estimate of the very local interests referred to by Mr. Justice Story. The statute was deliberately aimed at gas moving in interstate commerce; it was designed to produce

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[6] See *Hood v. DuMond,* 336 U.S. 525, 533 (1949).

revenue for the State of Texas by exacting a toll from interstate commerce; it imposes a heavy and effective burden upon such commerce; and, since, as applied to interstate pipelines, the burden of the tax ultimately will be borne by those persons in other states who consume the gas, the statute enables the State of Texas to achieve the politically popular result of raising revenue for local use at the ultimate expense of citizens of other states.[7]

(1) The Background and Purpose of the Statute

The tax here involved is labeled a gas "gathering tax" and purports to be imposed for the *privilege* of engaging in the occupation of "gathering gas." However, the term "gathering" has long been used in the gas and oil industry to mean the picking up of gas or oil at individual wells in the field and assembling it at a common point through a network of feeder pipelines, *Alexander v. Cosden Pipe Line Co.*, 290 U.S. 484 (1934). Michigan-Wisconsin engages in no such activity. Indeed, the Attorney General of Texas stipulated that Michigan-Wisconsin

> "gathers no gas (within the meaning of that term, as it is consistently used in the gas industry and in ordinary usage) in Texas or elsewhere" (R. 104-105).

Thus, what the Texas legislature did was to take a well-understood term and give it an artificial definition in the statute. "Gathering gas," as there de-

[7] Cf. *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S., at 433.

fined, means the "first taking" of possession of gas by a pipeline company "for other processing or transmission" through its pipeline after the gas passes through the outlet of a gasoline plant. It is not Phillips Petroleum Company, the real "gatherer" of gas (R. 105), that pays the tax, but Michigan-Wisconsin, which does no more than receive the gas into the inlet of its pipeline system for immediate interstate transportation. Of course, the legislature may define its terms as it chooses. Nevertheless, its appropriation of a well-understood term to describe a totally different activity, upon which the tax is imposed, is sufficient alone to justify a suspicion that the tax is one which, in the words of Mr. Justice Brandeis, is "furtively directed" at interstate commerce.[8]

The legislature's purpose in enacting the statute was more candidly stated in the report to the House of Representatives by a member of the House-Senate Conference Committee, who said, in explaining the Bill:

> "You will further recall that by practically every vote that was taken here in the House that we have shown conclusively that *we want a tax on the gas that leaves the State of Texas.* Your Committee feels that the House still wants that very thing . . . To be perfectly frank with you, and I have nothing whatsoever to hide, that suggested compromise is a cross between a gathering tax and the Hull-Vick amendment. *It will tax the pipeline gas that goes out of the State of Texas and give as much protection as possible to Texas industries* . . . You know we have ap-

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[8] *Cudahy Packing Co. v. Hinkle,* 278 U.S. 460, 468 (1929).

proximately twelve million dollars to raise and you people know that twelve million dollars is a large amount of money and it will vitally affect the ones that have to pay it . . . I say to you that the issue is now drawn as to whether or not gas piped out of Texas will be taxed or the money will be raised by adding to the already overtaxed landowner, royalty owner and producer. *I believe that the people of Texas want the gas piped out of the State to be taxed.*" House Journal of the 52nd Session of the Legislature of Texas, Regular Session, June 1, 1951, p. 2979. (Emphasis supplied).[9]

Here, at any rate, there is no subterfuge. In order to raise additional money for state general revenue purposes the Texas legislature is in effect attempting to levy a tax upon the people of Missouri, Iowa, Michigan and Wisconsin, of Illinois, Ohio, Kentucky, Indiana and a host of other states; and the interstate commerce among the states, which it was the purpose of the Commerce Clause to protect, is the medium by which this shifting of the burden of taxation is sought to be accomplished. It is significant that *every penny* of the $428,523.86 in taxes that Michigan-Wisconsin paid during the 10 months prior to the judgment had come from the pockets of residents of Missouri, Iowa, Michigan and Wisconsin, and that, with trifling exceptions, *every penny* of the $484,826.86 paid by Panhandle had similarly

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[9] Of course, the gas that is piped out of Texas is already heavily taxed. The state now levies a production tax amounting to 5.72 per cent of the value of the gas and the producer pays an additional ad valorem tax on the value of his lease and producing facilities. Each appellant pays an ad valorem tax on the value of all its facilities in the state (R. 113 and 85).

come from the pockets of residents of states other than Texas during that same period (R. 29 and 32).

If any further evidence were needed of the purpose to tax the consumers of gas in other states by a tax on interstate transportation agencies, it may readily be found in two other provisions of Section XXIII. In the first place, Section 4 (App. p. 65) makes it unlawful for any "gas gatherer" (i.e. interstate pipeline company) to attempt by contract to shift the tax to a producer. In other words, producers of gas cannot under any circumstances be made to bear the burden of this tax; *it must at all events be borne by the pipeline companies* and, eventually, by the consumers.

In the second place, Section XXIII expressly provides in Section 11 (App. p. 70):

> "In the event the tax levied by this Section is declared unconstitutional or invalid by a court of competent jurisdiction as to gas gathered for interstate transmission, the tax shall not be levied as to gas gathered for intrastate consumption."

The greater portion of the natural gas produced in Texas and affected by the tax is transported to other states for consumption. The Texas legislature has made it perfectly plain that the purpose of the statute will not be accomplished if the tax cannot lawfully be applied to gas which moves in interstate commerce.

It is difficult to conceive a clearer case of a tax intended to rest directly upon interstate commerce, or a bolder attempt to make interstate commerce (i.e., the people of other states) bear the burdens of a state's local government.

(2) *The "Loading of a Pipeline" With Gas For Immediate Transportation to Other States Is a Part of Interstate Commerce, — Not a "Local Activity" Which is Separate and Distinct from Interstate Commerce*

Insofar as the opinion of the Court of Civil Appeals is capable of rationalization, it appears to rest upon the theory that the "taking possession" of gas for transportation is a "local activity" separate from interstate commerce and thus not protected by the limitations on state action imposed by the Commerce Clause. Aside from the quotation of general statements from certain of this Court's opinions, the Court of Civil Appeals apparently placed sole reliance upon *Utah Power & Light Co. v. Pfost*, 286 U.S. 165 (1932), where the *generation* of electric power was held to be sufficiently separate from its transmission to sustain a state tax. Cf. *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

The attempted isolation of a pretended or fictitious "local activity" engaged in by an interstate business as the incident to be taxed has been a favorite device by which attempts have repeatedly been made to circumvent the Commerce Clause. This Court stated in *Nippert v. Richmond*, 327 U.S. 416, 423 (1946):

"... If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to

lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a State could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the States and necessarily involves 'incidents' occurring within each State through which it passes or with which it is connected in fact. *And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local,' and thus achieve its desired results.*"
(Emphasis supplied)

That the State of Texas did in this case attempt to "carve out from what is an entire or integral economic process" a particular phase or incident, which the Court of Civil Appeals apparently has labeled as "separate and distinct" or "local," cannot be gainsaid, *Memphis Steam Laundry v. Stone*, 342 U.S.389, 393 (1952), It is argued that the act of "taking possession" of gas for transmission interstate through a pipeline is separate and distinct from that transmission. How can a carrier possibly transport goods unless it first "takes possession" of them? One can readily visualize *production* of a commodity as distinct from transportation, and it is on this basis that taxes on *production* of goods, energy or minerals for subsequent transportation in interstate commerce have been sustained, *Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 180, 182 (1932); *Hope Natu-*

ral Gas Co. v. Hall, 274 U.S. 284, 288 (1927); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 178 (1923).[10] But is it possible to visualize the transportation of an article apart from the carrier's taking possession of the article? Under any conceivable view of the economic process of transportation, one is an inseparable, indivisible part of the other.

That, certainly, has always been this Court's view of the process of "taking possession" of goods for interstate commerce. In the so-called "stevedoring cases," *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90 (1937) and *Joseph v. Carter & Weeks Stevedoring Co.*, 330 U.S. 422 (1947), this Court struck down state statutes which levied a tax upon the receipts of companies engaged in loading ships for interstate commerce. In its opinion in the earlier case this Court pointed out:

"The business of appellant, in so far as it consists of the loading and discharge of cargoes by longshoremen subject to its own direction and control, is interstate or foreign commerce.

"Transportation of a cargo by water is impossible

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[10] The very distinction which the Court of Civil Appeals refused to recognize is specifically drawn in the Pfost case, upon which the state court relied. In that case this Court stated:

> "We think, therefore, it is wholly inaccurate to say that appellant's entire system is purely a transferring device. On the contrary, the generator and the transmission lines perform different functions, with a result comparable, so far as the question here under consideration is concerned, to the manufacture of physical articles of trade and their subsequent shipment and transportation in commerce." 286 U.S. at 180-181.

In each of the present cases, on the other hand, appellant's entire system "is purely a transferring device."

or futile unless the thing to be transported is put aboard the ship and taken off at destination . . ." 302 U.S. at 92.

And in the *Carter & Weeks* case, this Court said:

"... The transportation in commerce, at the least, begins with loading and ends with unloading. Loading and unloading has effect on transportation outside the taxing state because those activities are not only preliminary to but are an *essential part of* the safety and convenience of the transportation itself." 330 U.S. at 427-8. (Emphasis supplied.)

It is not without significance that the Court of Civil Appeals, in describing Panhandle Eastern's activities, stated that "Panhandle *loads* its interstate pipeline with gas from the outlets of three gasoline plants, . . ."[11] It is this very act of "loading" interstate pipelines upon which the State of Texas has placed a privilege tax, despite the fact that this Court has said that "the transportation in commerce, at the least, begins with loading and ends with unloading."

Similarly, in *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196 (1885), this Court struck down a state tax upon a ferry company operating between Philadelphia and Gloucester, New Jersey, saying:

"... the business of landing and receiving passengers and freight at the wharf in Philadelphia is a necessary incident to, indeed is a part of, their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. *Transportation implies the taking up of per-*

[11] (R. 40), 255 S.W. 2d at 539.

sons or property at some point and putting them down at another. A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two States involved in such transportation." 114 U.S. at 203. (Emphasis supplied.)

Again, in cases arising under the Export-Import Clause of the Constitution (Article I, Section 10, Clause 2), where the analogous problem arises of determining when the movement in foreign commerce commences, this Court has held that delivery of the commodity to a carrier is an integral part of the commerce itself. In *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 82-83 (1946), for example, this Court said:

"The foreign purchaser furnished the ship to carry the oil abroad. Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. *That delivery marked the commencement of the movement of the oil abroad.* . . . It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point. The means of shipment are unimportant so long as the certainty of the foreign destination is plain." (Emphasis supplied.)

Insofar as certainty and continuity of movement are factors in determining when interstate commerce begins, it can be stated categorically that at the moment the gas is "taken" by Michigan-Wisconsin—the moment that the tax is imposed—the gas is *already flowing* toward definitely fixed and certain destinations in Missouri, Iowa, Michigan and Wisconsin. This is true, first, because the pipeline has

no other outlets within the State of Texas through which gas might be diverted, and second, because appellant's certificates of convenience and necessity specify points outside Texas to which the gas must be delivered. This case thus presents the ultimate in certainty of interstate destination even before Michigan-Wisconsin takes possession of the gas. The same is true as to the gas of which Panhandle takes possession for transportation to its markets outside the state.[12]

This case also presents the ultimate in continuity of interstate movement. As indicated above, the parties have stipulated (R. 110), and the Court below noted:

> "The movement of such gas from the producing wells to points of delivery to Michigan-Wisconsin at the outlet of the Phillips gasoline plant and thence through pipelines to consumers in Michigan and Wisconsin is a steady and continuous flow" (R. 39).

A similar statement was stipulated as to Panhandle (R. 83).

Thus, there is no storage here involved, no break, no hesitation, but a continuous even movement from

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[12] As a matter of fact, the destination of the residue gas purchased by Michigan-Wisconsin from Phillips is fixed from the moment it leaves the wellhead, since Phillips is bound by contract to deliver to Michigan-Wisconsin the residue gas from all wells drilled in acreage "dedicated" to the latter (R. 106). It was also stipulated that all the residue gas purchased by Panhandle at the outlets of the three gasoline plants is committed by contract to sale to Panhandle for transportation to points in other states, except the small quantities sold within the state (R. 73).

the gasoline plants involved into appellants' pipelines, through their compressor stations and across the state line.[13]

Of course, a state may validly levy a non-discriminatory tax upon a true local activity—an activity that is separate and distinct from interstate commerce. But while the Court of Civil Appeals refers to the "gathering" of gas as such a local activity, its recitals and the stipulated facts demonstrate with complete clarity that the incident taxed—the mere receipt by appellants of moving gas into the mouths of their interstate pipelines—is not and cannot be divorced from the economic function which they perform, namely, the interstate transportation of gas.

The principle here involved is in no way limited to oil and gas. Precisely the same factors come into play when a carrier receives possession of wheat at the spout of an elevator, of cotton at the platform of a compress, of lumber at the outlet of a sawmill, of coal at a chute, of automobiles at a loading ramp. If the taking possession of gas for immediate transportation to other states is not a part of interstate commerce, but is separate and distinct therefrom, Minnesota may clearly tax the owners of ore boats for the privilege of "taking possession" of iron ore at Duluth for immediate transportation to Gary; West Virginia certainly may tax the railroads and barges

[13] Under circumstances of similar continuity of movement and certainty of destination, this Court had "no doubt" that the movement of gas was in interstate commerce, *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682, 687 (1947). See also *Eureka Pipe Line Company v. Hallanan*, 257 U.S. 265 (1921) and *United Fuel Gas Company v. Hallanan*, 257 U.S. 277 (1921).

at so much per ton for the privilege of "taking possession" of coal for transportation to other states; Michigan would have an equal right to tax the carriers of motor vehicles for the privilege of "taking possession" of those vehicles for transportation throughout the country.

The Commerce Clause was designed to end precisely this kind of impost laid upon commercial intercourse between the states. The tax here involved has the same effect as if Texas had erected custom houses at points where its highways cross over into other states and was requiring every carrier, upon leaving Texas, to pay a tax on the goods carried, for the privilege of having "taken possession" of those goods within the state. If that kind of a tax is held valid, custom houses will certainly spring up on the other side of the state's boundaries in retaliation, and every state may soon be expected to tax heavily the receipt for interstate transportation of those of its products which are most valuable to its neighbors. Cf. *Case of the State Freight Tax*, 15 Wall. 232, 276 (1872).

(3) *The Effect of the "Gathering Tax" Upon Interstate Commerce and Consumers of Gas*

The vice of the present statute is particularly pronounced because:

(a) it is imposed upon the entire volume of interstate commerce and thus taxes appellants' activities outside Texas; (b) it is in purpose and effect a tax upon the residents of other states; and (c) it is aimed specifically at transportation companies. These cir-

cumstances emphasize the pernicious effect of the tax upon interstate commerce, as will be pointed out.

(a) *The "gathering tax" is imposed upon the entire volume of interstate commerce.*

It is at once apparent that the tax here involved is imposed upon the *entire* volume of gas transported interstate. Since the tax is fixed at 9/20 of a cent per m.c.f. of gas of which appellants "take possession" for transportation through their pipelines, and since *all* of the gas so taken (except for insignificant quantities in the case of Panhandle) moves immediately and directly in interstate commerce, the result is that the tax is measured by the total amount of interstate commerce that appellants carry on, both within and without the State of Texas.

In this respect, the tax here involved is precisely the same, in logic and practical effect, as an unapportioned gross receipts tax upon interstate transportation, which this Court has not sanctioned since, at least, 1887. In *Gwin, White & Prince, Inc. v. Henneford,* 305 U.S. 434, 441 (1939), the Court stated:

> "For more than a century, since *Brown v. Maryland,* 12 Wheat. 419, 445, it has been recognized that under the commerce clause, Congress not acting, some protection is afforded to interstate commerce against state taxation of the privilege of engaging in it. (Citations) For half a century, following *Philadelphia & Southern S. S. Co. v. Pennsylvania,* 122 U.S. 326, it has not been doubted that state taxation of local participation in interstate commerce, *measured by the entire volume of the commerce,* is likewise foreclosed." (Emphasis supplied.)

Indeed, while taxes measured by the *volume* of interstate commerce are usually considered as one with gross receipts taxes, this Court at first sustained a state tax upon gross receipts from interstate commerce, *State Tax on Railway Gross Receipts*, 15 Wall. 284 (1872), but in a companion case it struck down a state tax of two to five cents per ton of freight transported by carriers in interstate commerce—the very type of tax here involved, *Case of the State Freight Tax*, 15 Wall. 232 (1872).[14] In the case last cited this Court said:

"The legislature of Pennsylvania has in effect declared that every ton of freight taken up within the State and carried out . . . shall pay a specified tax. The payment of that tax is a condition, upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other States would be rendered impossible.

. . .

"If, then, this is a tax upon freight carried between States, and a tax because of its transportation, and if such a tax is in effect a regulation of interstate

[14] The gross receipts tax held valid in the *Gross Receipts* case was distinguished from the tonnage tax on the grounds (1) that the tax, being collectible only once in six months, was laid upon a fund that had become mingled with the general property of the company, and (2) that the tax was upon the franchise of the corporation. The first ground was expressly overruled in *Philadelphia & Southern S. S. Co. v. Pennsylvania*, 122 U.S. 326, 342 (1887), and since that time gross receipts taxes and volume or tonnage taxes have been treated as identical in principle. See also *Fargo v. Michigan*, 121 U.S. 230 (1887).

commerce, the conclusion seems to be inevitable that it is in conflict with the Constitution of the United States." 15 Wall. at 276, 279.

The same question, i.e., the validity of a tax measured by the entire volume of interstate commerce, again arose in *Western Union Telegraph Company v. Texas*, 105 U.S. 460 (1881), where the state had imposed an occupation tax upon telegraph companies at the rate of one cent per full rate message and one half cent for every message at less than full rate. This Court, after referring to the *Case of the State Freight Tax, supra*, to cases involving taxes upon carriers of passengers at specific amounts per passenger, and to cases dealing with taxes on vessels according to measurement, held the tax on telegrams invalid, stating:

"The present case, as it seems to us, comes within this principle. The tax is the same on every message sent, and because it is sent, without regard to the distance carried or the price charged. It is in no respect proportioned according to the business done. If the message is sent the tax must be paid, and the amount determined solely by the class to which it belongs. If it is full rate, the tax is one cent, and if less than full rate, one-half cent. Clearly if a fixed tax for every two thousand pounds of freight carried is a tax on the freight, or for every measured ton of a vessel a tax on tonnage, or for every passenger carried a tax on the passenger, or for the sale of goods a tax on the goods, this must be a tax on the messages. As such, so far as it operates on private

messages sent out of the State, it is a regulation of foreign and interstate commerce and beyond the power of the State." 105 U.S. at 465-6.

Just as in the cases cited above, as well as cases where the entire gross receipts from interstate commerce were taxed, the present "gathering tax" is measured not by the amount of business done within the taxing state but by the amount done in *all* states through which the carrier operates. That is, the 9/20 of a cent per m.c.f. obviously does not attempt to measure the activities carried on by Michigan-Wisconsin and Panhandle within the State of Texas. Michigan-Wisconsin pays as much in taxes per unit of volume for the "privilege" of taking possession of gas which it transports a mere 1.74 miles to the Oklahoma line as is paid by a company which operates a pipeline several hundred miles within Texas. The words of Mr. Justice Stone, speaking for the Court in *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 439 (1939), are therefore applicable *in toto* to the present tax:

"Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state: If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk

of a multiple burden to which local commerce is not exposed."[15]

Similarly, in the present case, gas transported by a pipeline solely within the State of Texas would be subject to a single tax of 9/20 of a cent per m.c.f., whereas Michigan-Wisconsin and Panhandle, respectively, would be subject to an additional tax on a comparable fictitious "local activity" in every state through which its pipeline runs. It would be nonsense to say that only Texas could lay such a tax because it is the state of origin of the commerce. If Texas may impose a tax upon pipelines for the privilege of "taking or retaining possession" of the gas in Texas for transportation elsewhere, Oklahoma also may levy a tax, measured by the entire volumes of gas transported, for "taking or retaining possession" of the gas within that state, and so may each other state through which the pipelines run. Moreover, if Texas can impose a tax for the privilege of "loading" the pipeline, Michigan and Wisconsin could impose a tax for the privilege of "unloading" the pipeline. *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 429 (1947).

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[15] The Court also noted:

"Both the compensation and the tax laid upon it are measured by the amount of the commerce—the number of boxes of fruit transported from Washington to purchasers elsewhere; so that the tax, though nominally imposed upon appellant's activities in Washington, *by the very method of its measurement* reaches the entire interstate commerce service rendered both within and without the state *and burdens the commerce in direct proportion to its volume.*" 305 U.S. at 438 (Emphasis supplied).

(b) *The "gathering tax" is in purpose and effect a tax imposed for the local benefit of Texas upon residents of other states.*

The tax here involved concerns a product found in relatively few states but desired in many. From the State of Texas, for example, natural gas flows to some 38 other states. Gas transported by Michigan-Wisconsin alone serves consumers in Missouri, Iowa, Michigan and Wisconsin, while consumers of gas carried by Panhandle reside in Kansas, Missouri, Illinois, Indiana, Michigan, Ohio, Pennsylvania and Ontario, Canada. The State of Texas thus has a tremendous leverage which it can exert throughout the nation by means of a tax upon interstate commerce in natural gas at the very source of that commerce.

At present, the tax is in the amount of 9/20 of a cent per thousand cubic feet of gas. This, in itself, reaps tremendous tax payments for the State of Texas from out of state consumers of gas. But there is nothing to prevent that tax rate from being doubled or tripled at the expense of the out of state consumers, and there undoubtedly would be those within the State who would urge just such a course. Since the avowed purpose of the statute is to "tax the pipeline gas that goes out of the State of Texas and give as much protection as possible to Texas industries," (*supra*, p. 20) there are absolutely no safeguards against a wholesale shift of burdens of financing local government from the people of Texas to consumers of gas in other states. It was legislation of this kind about which this Court, in *South Caro-*

lina State Highway Dept. v. Barnwell Bros., 303 U.S. 177, 185-6 (1938), commented:

"The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have recognized that there is scope for its like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state."[16]

(c) *The "gathering tax" is aimed specifically at interstate transportation companies.*

In the third place, the tax statute here involved is aimed specifically at transportation companies—carriers of gas by pipeline. The dominating effect of the statute, and the avowed purpose of its sponsors, was to "tax the *pipeline* gas that goes out of the State of Texas" (*supra*, p. 20). The statute thus strikes at the vitals of interstate commerce—at "a transaction forming an unbroken process" of the transportation itself. Cf., *McLeod v. Dilworth*, 322 U.S. 327, 331.

The fact that Congress considers the interstate transportation of natural gas to be within the sphere

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[16] This Court further stated in the *Barnwell* case:

"Underlying the stated rule has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." 303 U.S. at 185 (fn. 2).

of national interest is indicated by the terms of the Natural Gas Act.[17] In this connection, the sales of gas by Phillips to Michigan-Wisconsin and Panhandle which are coincident with the "taking" of the gas by appellants under the Texas statute, were the subject of a very recent decision of the Court of Appeals for the District of Columbia, *Wisconsin v. Federal Power Commission*, 205 F. 2d 706 (cert. denied, November 30, 1953). The Court of Appeals held that the sales and deliveries by which Michigan-Wisconsin and Panhandle are enabled to "take possession" of the gas so purchased—the activity for which they are taxed by Texas—are sales and deliveries in interstate commerce.

(4) *The Incidence of the Tax*

It cannot be said that the tax is one in the nature of a tax on property or one in lieu of a property tax. The tax is not measured by, and has no relation to, the amount or value of property within the state.

Nor can it be said that the tax is one in the nature of a charge for the use of facilities provided by the state, *Sprout v. South Bend*, 277 U.S. 163 (1928), or that it is one imposed for the purpose of obtaining reimbursement of expense of inspection, supervision or regulation, *Ingels v. Morf*, 300 U.S. 290 (1937). Appellants do not use any facilities provided by the state. The state imposes no supervision over or regulation of appellants' activities in transporting gas in interstate commerce, and, therefore, there is no cost of inspection, supervision or regulation to be

[17] Title 15, U.S.C., Sec. 717 (a).

recouped by the state. The costs of administering the conservation laws and regulations are more than recouped by the state through production taxes imposed upon those who produce oil and gas, for whose benefit those laws and regulations are designed. Vernon's Annotated Civil Statutes, Article 6032. Large sums of money are paid into the state's general fund each year after all expenses of administering the conservation laws and regulations have been paid from moneys collected under that production tax (R. 218).

The Court of Civil Appeals recognized that the tax is imposed by "a revenue statute" (R. 35), 255 S.W. 2d, at 537. It could not do otherwise, in view of the disposition required by Sections 6 and 10 of the Act to be made of the sums of money collected thereunder. Section 6 (App., p. 66) provides for the allocation of an insignificant portion of the tax (not more than 1/5 of 1 per cent) for the employment of auditors and technical assistants "to verify reports and determine whether the tax is being properly reported and paid." Section 10 of the Act (App., p. 70) requires that the remainder of the tax (at least 99.8 per cent of the total) be apportioned 1/4 to the Available Free School Fund and the remaining 3/4 to the General Revenue Fund.

That the Act is one for the purpose of raising revenue for general purposes is recognized by appellees in the "Motion to Advance," which they filed in these causes. The primary reason there advanced for an early disposition of the litigation is that:

"An immediate need exists for money to finance *a program of drouth relief, an increase in teachers' salaries, public employees' salaries*, and the *financ-*

ing of the Texas eleemosynary institutions. In view of the recent reduction of the Texas oil allowables, the revenue of Texas has been greatly curtailed and an early decision in these cases would be extremely advantageous in determining financial needs *to be supplied by a called session of the Texas legislature.*" (Emphasis supplied.)

Thus, appellees recognize that the purpose of the tax is (just as its sponsor before the House, in effect, stated) to require that consumers of gas in other states bear to a great extent the burden of increasing the salaries of the teachers and public employees in Texas, the financing of the Texas eleemosynary institutions, and the financing of a program of drouth relief within the State of Texas—all to be accomplished by hereafter convening a special session of the legislature for appropriating the money.

The tax is not one imposed against the producer of gas, is not one imposed on the gatherer of gas (as that term is ordinarily used) and is not one on the operator of a gasoline plant (such as Phillips) who separates the produced gas into its marketable constituents of liquefiable hydrocarbons and residue gas. Prior to the time that the residue gas reaches the outlet of the gasoline plant, the raw gas has been produced, gathered to a gasoline plant, and separated into its marketable constituents of liquid hydrocarbons and residue gas (R. 109).

Reduced to its essentials, the challenged statute levies a tax of 9/20 of a cent per m.c.f. upon Michi-

gan-Wisconsin and upon Panhandle for the *privilege* of taking possession of residue gas for direct, immediate and invariable transportation in interstate commerce. The tax has all the earmarks of a privilege tax, and none of the earmarks of a property tax, or one for the recoupment of expenses incurred by the state in supervising or regulating appellants' activities.

The statute expressly states that the tax is "for the privilege of engaging in the business" of "gathering gas," which, as previously explained, is defined as the taking possession of residue gas for transportation at the outlet of a gasoline plant. If it pays the tax, a pipeline company can exercise this "privilege" and operate its business. Conversely, however, the statute makes it the duty of the Attorney General of Texas to enjoin any person who is delinquent in the payment of the tax from engaging in the business of "gathering gas" (App., p. 67). Hence, if a pipeline company does not pay the tax, it can be enjoined from exercising the "privilege" and cannot thereafter engage in the interstate transportation of gas. This aspect of the statute clearly shows that the tax is imposed upon the privilege of engaging in interstate commerce itself since, if the tax is not paid, the State of Texas has arrogated unto itself the power to stop the commerce.

(5) *There is no "Further Processing" of Gas by Michigan-Wisconsin*

One statement in the opinion of the Court of Civil Appeals deserves brief individual comment. At the

conclusion of its opinion, without explanation of any kind, the Court stated:

"The taxable event described by the statute, as to Michigan-Wisconsin, occurs between processing conducted by Phillips and further processing done by Michigan-Wisconsin in the State of Texas, all prior to the time the gas is finally committed to its interstate journey." (R. 54), 255 S.W. 2d at 546.

Appellants are frankly at a loss to know what "further processing" Michigan-Wisconsin conducts in the State of Texas—or anywhere else. After the gas enters Michigan-Wisconsin's lines it goes immedately into its 24-inch line and across the state line into Oklahoma.

If, by "further processing," the court meant the operation of Michigan-Wisconsin's compressor station, the statement is without foundation. The only purpose of the compressor station, as this Court knows, is to build up pressure sufficient to move the gas along the pipeline.[18] It supplies the motive power by which interstate commerce is conducted, just as a locomotive, a truck-tractor or a ship's turbine supplies the motive power for those forms of transportation, and it performs the same function as does a relay station operated by a telephone, telegraph or power company and a pumping station used by a transporter of oil. The Court of Civil Appeals itself noted earlier in its opinion:

[18] In *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682, 689, this Court stated that "the increase of pressure in the compressor stations must be regarded as merely an incident in the interstate commerce rather than as its origin."

"The taking of such gas at the outlet of the gasoline plant is accomplished through facilities owned by Michigan-Wisconsin *and used exclusively by it in the taking and transportation of such gas.*" (R. 39), 255 S.W. 2d at 539.

Referring to the use of such facilities as a "processing" operation cannot change the facts, or the application of the Commerce Clause to the facts.

Moreover, contrary to the assertion of the Court below, the gas is "committed" to interstate commerce before it enters the compressor station in every conceivable sense of the word. It can go nowhere else, physically or contractually, from the moment it enters Michigan-Wisconsin's lines at the outlet of the Phillips gasoline plant, *Hughes Bros. Timber Co. v. Minn.*, 272 U.S. 469, 475-6 (1926). (See *supra*, pp. 8-9.) It does so invariably, unceasingly, unhesitatingly. How the gas could be more firmly "committed to interstate commerce" than is the case when Michigan-Wisconsin takes possession of the gas from Phillips is quite beyond comprehension. This commitment to interstate transportation is also true as to the gas of which Panhandle takes possession at the outlets of the three gasoline plants.

(6) *The "Gathering Tax" Violates Basic Policies Underlying the Commerce Clause*

This Court has consistently held, as pointed out in *Spector Motor Service v. O'Connor*, 340 U.S. 602, 610 (1951):

"... there is not only reason but long established precedent for keeping the federal privilege of carry-

ing on exclusively interstate commerce *free* from state taxation." (Emphasis supplied.)

It has been stated time and again that the right to engage in an activity that is a part of interstate commerce is a right that is created and protected by the Commerce Clause, and not by state laws; that a state may not impose a privilege tax as a condition for exercising that constitutional right.

The members of the Court have not always been able fully to agree as to whether a particular tax is one in the nature of a property tax or one on the right to engage in an activity that is a part of interstate commerce. They have not always been able to agree as to whether a particular activity is one that is a part of interstate commerce or a local activity, separate and distinct from interstate commerce, though closely related to such commerce. But the Court has consistently held that the state cannot lawfully impose a tax for the privilege of carrying on an activity that is a part of commerce.

If the state has the right to impose this tax, it has a right to impose a tax for the privilege of receiving telegraph messages for interstate transmission or telephone calls for connection; on the right to receive for interstate transportation freight on a train or truck or cargo on a ship. This field of taxation is one reserved by the Commerce Clause for the federal government, *McLeod v. Dilworth*, 322 U.S. 327, 331. There is no distinction in principle between loading a pipeline and loading a train, truck, steamboat or tanker.

It is a mere play on words to argue that while a state cannot impose a tax for the privilege of *trans-*

porting commodities to other states, yet it can impose such a tax for the privilege of taking possession of commodities *for* such transportation. On that theory there would, in fact, be no protection of interstate commerce afforded by the Commerce Clause. Transportation of commodities is "impossible or futile" unless the thing to be transported is put aboard the carrying facility and taken off at destination. *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90, 92 (1937).

It is submitted that the Texas "gathering tax" is violative of the basic purposes and precepts of the Commerce Clause. It would accomplish what its sponsors desired, namely, to "tax the pipeline gas that goes out of the State of Texas and give as much protection as possible to Texas industries." But the accomplishment of purposes of this kind is precisely what the Commerce Clause was designed to prevent.

II.

The Enforcement by the State of Conservation Laws and Regulations Does Not Justify Imposition of a Tax for the Privilege of Engaging in Interstate Commerce.

(1) *The "Benefits, Protection and Opportunities" Argument Is Irrelevant to the Issues Raised by These Appeals*

In their Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, appellees sought to defend the "gathering tax" on the ground that enforcement of the Texas oil and gas conservation and proration

laws and regulations confers "benefits, protection and opportunities" upon appellants which justify imposition of the tax here involved. Apparently to support that theory, appellees introduced the testimony of William J. Murray, Jr., a member of the Texas Railroad Commission, whose testimony is set out at length in the opinion of the Court of Civil Appeals (R. 41-46).

Because of the emphasis that appellees have placed upon these repeated references to the supposed "benefits, protection and opportunities" to appellants from Texas laws and regulations, appellants will point out specifically and in detail why this argument by appellees is, on its facts, without foundation. See *infra*, pp. 50 to 57. But even more important, the entire argument, first conceived long after the statute was passed, has no relevance whatever to the only question before this Court, namely, whether a tax upon the privilege of taking possession of gas for immediate interstate transmission can stand consistently with the Commerce Clause.

In their Statement Opposing Jurisdiction (p. 2), appellees set forth what they considered the "proposition of law which governs this appeal" as follows:

> "Although a person is engaged solely in interstate commerce, a state may validly levy a non-discriminatory tax upon a local incident or activity of the interstate business, which is separate and apart from the actual flow of commerce, *provided* the taxpayer is receiving from the state levying the tax, benefits, protection or opportunities which bear a fiscal relationship to the tax." (Emphasis supplied.)

Appellants have no quarrel with this statement as an abstract principle. Obviously, if a tax *is* upon a local incident separate and apart from interstate commerce, a state may lay a tax upon that local incident if it has afforded the taxpayer sufficient "benefits, protection and opportunities" to satisfy the requirements of due process. But the question here, the answer to which appellees have assumed, is whether the incident taxed *is* separate and apart from that commerce.

The phrase, "benefits, protection and opportunities," had its origin in this Court's opinion in *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444 (1940), where the Court, in defining a state's "jurisdiction to tax" in a territorial sense, stated:

> "That test is whether property was taken *without due process of law*, or, if paraphrase we must, whether the taxing power exerted by the state *bears fiscal relation to protection, opportunities and benefits* given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." (Emphasis supplied.)

The phrase was used again in *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174 (1949), in this context:

> "The problem under the Commerce Clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.' (Citation) *So far as due process is concerned* the only question is whether the tax in practical operation has relation to *opportunities, benefits, or protection* conferred or afforded by the taxing State." (Emphasis supplied.)

As is apparent from these excerpts, the "benefits, protection and opportunities" reasoning is related to the power of the state, *under the Due Process Clause*, to impose a tax upon a particular person or company. It is not, and has never been, a criterion by which to measure the power of the state to tax the privilege of carrying on interstate commerce.

The validity of the Act as tested by the Due Process Clause is not here involved. While appellees' attempt to link the conservation laws and regulations (which have to do with the *production* of oil and gas) to the transportation activities of interstate pipeline companies has no basis in fact, as will be pointed out *infra*, the question raised by appellants in these appeals is whether, granting *arguendo* that there is sufficient relation between the assumed "benefits, protection and opportunities" afforded by Texas to support a tax against appellants in a due process sense, a tax upon interstate commerce itself, measured by the entire amount of that commerce, violates the Commerce Clause. Appellees have thus erected a straw man and have labored mightily to knock it down. But in doing so they have not touched the issue of the validity of the "gathering tax" under the Commerce Clause.

The language of this Court in *Nippert v. Richmond*, 327 U.S. 416, 423-424 (1946) is directly applicable to the effort by appellees to inject due process arguments into a Commerce Clause case:

"It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of

the tax. This is not to say that the presence of so-called local incidents is irrelevant. On the contrary the absence of any connection in fact between the commerce and the state would be sufficient in itself for striking down the tax on due process grounds alone; and even substantial connections, in an economic sense, have been held inadequate to support the local tax. *But beyond the presence of a sufficient connection in a due process or 'jurisdictional' sense, whether or not a 'local incident' related to or affecting commerce may be made the subject of state taxation depends upon other considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce.*" (Emphasis supplied.)

In short, while it is essential to the validity of a tax under the Due Process Clause that the incident selected bear substantial relation to the "benefits, protection and opportunities" afforded by the state, the question whether that incident is a "local incident" separate from the commerce itself "depends upon other considerations of constitutional policy" having reference to the effect of the tax "in suppressing or burdening unduly the commerce." If the incident on which the tax is placed is not a local incident, *separate and apart from commerce,* the state has no power to impose a tax on that incident, regardless of any benefits, protection and opportunities afforded by the state laws. Appellants have already shown clearly that the incident here taxed is not a "local incident, separate and apart from commerce" but is an essential and integral part of interstate commerce itself.

(2) Appellants Receive No Special "Benefits, Protection and Opportunities" Under the Conservation and Proration Statutes of Texas

While, as stated above, appellees' argument based on the Texas conservation and proration laws is wholly irrelevant to the issue raised by these appeals, appellants will point out the lack of factual support for such argument.

The Texas statute by which the conservation of oil and gas is accomplished shows on its face that it was enacted for the purpose of preventing waste and protecting the correlative rights of producers (among themselves) by compelling ratable production.[19] The history of the industry shows that such statutes and regulations issued thereunder are for the protection of producers *against each other* in order that all producers may have an opportunity to produce their fair shares of the total quantity of recoverable oil and gas in a common pool. Such statutes and regulations have been sustained only because they were enacted and promulgated for that purpose and have that effect. *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 69 (1937). In fact, is was stipulated in the instant cases:

[19] The "declaration of policy" which is contained in the Texas Conservation Act is as follows:

"In recognition of past, present and imminent evils occurring in the production and use of natural gas, as a result of waste in the production and use thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production," Article 6008, V.A.C.S., Sec. 1.

"Proration orders affecting the sweet gas portion of the Panhandle Field and the Texas portion of the Hugoton Field entered in 1948 were not designed to preserve the supply of any purchaser of gas for any particular time, but were *only designed to prevent waste and adjust correlative rights of all producers* in each of such fields for the aggregate markets supplied therefrom" (R. 120). (Emphasis supplied.)

Appellees contend that because of the enforcement of these conservation and proration regulations the pipeline companies receive benefits, protection, and opportunities through (a) lengthened economic life of their transmission facilities, (b) the right to make nominations for the purchase of gas, and (c) the right of *producers* of gas to adjust their rates of production on a seasonal basis.

(a) *The "lengthened life" argument*

Appellees base this argument on many "iffy" premises: *If* producers were permitted to drill as many wells as they desire; *if* they could open their wells at 100 per cent of the open flow; *if* they could burn both sour gas and sweet gas for making carbon black; *if* the producer, after extracting the liquid content from his gas, should flare the residue into the air —then the supply of gas would be exhausted earlier than otherwise. The statutes relied on are designed to end these practices.

According to Mr. Murray's own testimony (R. 160), these unrealistic premises are based on conditions that existed more than 15 years ago in the Panhandle Field at a time when the few pipelines

transporting gas from that field to other states had not had time to develop adequate markets in the states to which they then transported gas. He conceded that it is largely because additional pipelines have been constructed into Texas within the last few years (and during that same period older pipelines have greatly increased their purchases) that the State of Texas is able to enforce its laws prohibiting the waste of gas. He stated that the coming of the interstate pipelines into the state has assisted the Railroad Commission in putting into effect conservation measures which it probably would not have been able to enforce but for the markets for gas provided by those companies; that the conservation orders by the Commission and markets furnished by the pipeline companies are all inter-connected in the sense that "each kind of helps the other out a little bit" (R. 190).

Obviously, all purchasers of gas (not just the pipeline companies) will have supplies available for a longer period if gas is not wasted than they would if the gas is permitted to go to waste by the producers. It is simple arithmetic that the more apples that are taken from a barrel (whether to eat or to throw away) the fewer apples will be left in the barrel.

However, the pipeline companies are not the special beneficiaries under these laws. They receive incidental benefits from the prevention of waste, as do all other purchasers of gas. But they benefit not at all from the proration regulations. The producers benefit primarily and principally from the prevention of waste; and they alone benefit from prora-

tion. The State itself and its every citizen benefit from the conservation of oil and gas, the State's greatest natural resources. So do the owners of gasoline plants, carbon black plants, and the hundreds of industrial plants using gas as fuel. The producers and refiners of crude oil and the transporters of crude oil and refined products likewise benefit from the prevention of waste; but no such tax as that here involved is levied on the transporters of oil or refined products.

(b) The right to make "nominations".

Much is said by appellees about the fact that pipeline companies have the right to "nominate" purchases of gas. This right, however, is one which is common to all who desire to purchase gas for non-wasteful purposes, including industries as well as pipeline companies. Moreover, contrary to the implications of appellees' argument, it does *not* entitle the nominator to any gas. It was stipulated:

> "Neither Michigan-Wisconsin Pipe Line Company [Panhandle] nor any other purchaser had any guaranty under the terms and provisions of the Texas Conservation Laws, either before or after the issuance of regulations by the Texas Railroad Commission, that a particular supply of gas would be available to them for any particular period of time" (R. 120 and 96).

By Section 12 of the Conservation law (V.A.C.S., Article 6008), the Commission is required to determine the lawful market demand for gas to be pro-

duced from each reservoir during a particular period and the volume of gas that can be produced from such reservoir during such period without waste.

In order to ascertain such market demands from the reservoir, the Commission takes estimates (called nominations)[20] from all those who expect to purchase gas produced from the reservoir. The nominations are made for the sole purpose of assisting the Commission in determining the aggregate quantities of gas desired by those who want to purchase in order that the Commission may obtain a reasonable estimate of the market demand for use in apportioning the estimated demand among all producers on an equitable basis.

As a result of the nominations, the Railroad Commission enters an order granting to each producer the right to produce a specified quantity of gas if he can find a purchaser. Contrariwise, a nomination does not guarantee that a pipeline company will be able to purchase a single foot of gas (R. 152). The right to purchase is not contingent on the making of a nomination. The nominations, therefore, are solely a part of the procedure adopted by the Commission for the purpose of taking action designed to give each producer in the reservoir the opportunity to produce and sell, wherever he can find a buyer, his fair share of the total volume of gas which the Commission authorizes the producers as a class to produce and sell for all lawful purposes.

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[20] A copy of the official "nomination" form is set out at R. 237-238.

(c) The "overproduction" and "under-production" argument.

Commissioner Murray expressed the view that the Legislature "specifically for the benefit of the pipelines" passed an over and under six-months balancing provision (R. 153). The statute to which he referred (V.A.C.S. 6008, Sec. 14) provides:

> "In order to *adjust the correlative rights* and opportunities *of each owner to produce, use and sell* gas from a common reservoir from which a portion of the market demand is seasonal or where a portion thereof fluctuates from month to month, the Commission may permit the wells in such reservoir to be produced in excess of the monthly allowable if no waste is occasioned thereby." (Emphasis supplied.)

The statute then provides that if a producer does not have sufficient wells with the allowable production he needs during a particular month, he can overproduce his wells for a period of six months and then have a six-months period in which to make up the over-production.

There is nothing in the law to show that the provision referred to was for the benefit of the pipelines, specifically or otherwise. On the contrary, the statute shows on its face that it is for the benefit of the *producers* of gas.

(3) The effect of the "benefits, protection and opportunities" argument, if applied as a test under the commerce clause

If pipeline companies, in general, and these appellants in particular, receive benefits through the

operation of the conservation and proration laws and regulations of Texas, those benefits are in the category of the benefits received by those who purchase lumber in a state because of the laws protecting forests, or the benefits which those who make property investments in a state receive from the enforcement of laws prohibiting theft, malicious mischief and monopoly. The laws merely create a favorable condition in which to engage in business.

If the right to engage in interstate commerce can be taxed by a state because of the circumstance that the state, in order to prevent waste and protect correlative rights of its local producers who carry on local activities, has adopted conservation policies (or any other policy which makes the state a favorable one in which to purchase commodities for transportation), the area in which that philosophy could, with equal reason, be urged is almost without limit. Texas and other oil producing states have conservation regulations in order to prevent waste of oil and to protect the correlative rights of producers of oil; Texas and other lumber-producing states have stringent regulations for the protection of forests against wanton destruction, thereby safeguarding the rights of those who own such forests. The cotton-producing states have regulations for elimination of the boll-weevil. The citrus-growing states have regulations for the allocation of markets.

But does the circumstance that the state prohibits the waste of oil justify imposing upon those who operate railroads, tankers, trucks and pipelines a privilege tax for the right to take possession of oil and

its products, gasoline, kerosene, fuel oil, asphalt, etc., for the purpose of transporting the same to other states? Does the fact that the state adopts a policy of protecting forests justify imposing a tax on railroads, steamships and trucks for the privilege of taking possession of lumber for transportation to other states? Can a privilege tax, imposed on the right to take bales of cotton at compresses or cottonseed oil and cake at cottonseed oil mills into possession for transportation to other states, be sustained because of the circumstance that, but for the regulations imposed by the state in an effort to eliminate the bollweevil, there would not be as many bales of cotton or as much cottonseed oil or cake available for transportation?

Indeed, there are few instances in which a state could not, with some reason, lay claim to the right to tax interstate commerce if the only test were whether the instrumentality of that commerce is afforded "benefits, protection and opportunities" by the state. Necessarily, all interstate commerce is carried on within the confines of the states, as this Court has often remarked. Necessarily too, that commerce benefits from the very fact that state governments exist, that law and order prevail, that property rights are respected.

But the framers of the Constitution made certain that, despite those benefits conferred by the states, interstate commerce shall be free from regulations and burdens except those imposed by the national authority.

III

The Jurisdictional Question.

The Court has reserved until hearing on the merits a determination of whether the appeals are properly from the Court of Civil Appeals or from the Supreme Court of Texas.

In early cases, such as *Bacon v. Texas*, 163 U.S. 207 (1896), *St. Louis S. F. & T. Ry. Co. v. Seale*, 229 U.S. 156 (1913), and *Aransas Pass Ry. Co. v. Wagner*, 241 U.S. 476 (1916), this Court held that where the Texas Supreme Court "denied" a writ of error to review the judgment of the Court of Civil Appeals, the latter Court was "the highest court of a state in which a decision could be had," within the meaning of Title 28, U.S.C., Sec. 1257.

In 1927 there was added to Article 1728 of the Revised Civil Statutes of Texas an amendment which provided that when the Texas Supreme Court believes that the judgment of a Court of Civil Appeals is a correct one, and that the principles of law declared in the opinion of the Court of Civil Appeals are correctly determined, the Supreme Court will "refuse" an application for writ of error. This same provision has been carried into Rule 483 of the Texas Rules of Civil Procedure in the following language:

"In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the Court are correctly determined, the Supreme Court will refuse the application with the docket notation 'Refused.' In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all

respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation 'Refused. No reversible error.' In all cases where the Supreme Court is without jurisdiction of the case as presented in the application, it will dismiss the application with the docket notation 'Dismissed for want of jurisdiction.' "

Hence, since 1927, the "refusal" of a writ of error by the Texas Supreme Court, without the notation "no reversible error," has constituted at least an implied expression with respect to the merits of the decision of the Court of Civil Appeals. This fact affords some basis for an argument that decisions in such cases as the *Bacon*, *Seale* and *Wagner* cases, *supra*, are no longer controlling, and that, under decisions such as those in *Hetrick v. Lindsey*, 265 U.S. 384 (1924), and *Matthews v. Huwe*, 269 U.S. 262 (1925), whenever the Texas Supreme Court *refuses* an application for writ of error, that Court is the one from which an appeal or petition for certiorari to this Court should be prosecuted. Cf. *American Railway Express Co. v. Levee*, 263 U.S. 19 (1923).

The problem was not solved by *Bain Peanut Co. v. Pinson*, 282 U.S. 499 (1931), since the application for writ of error in that case had been "dismissed for want of jurisdiction," and not "refused". However, the question was directly raised in a motion to dismiss which was filed in connection with the appeal in *United Gas Public Service Co. v. Texas*, 301 U.S. 667 (1937). This Court denied the motion, citing, *inter alia*, *Norfolk & Suburban Turnpike Co. v. Virginia*, 225 U.S. 264 (1912). From such action, it might be

inferred that this Court believes that the refusal of a writ of error by the Texas Supreme Court is not "an affirmance in express terms" within the holding of the *Norfolk* case, with the result that appeals and petitions for certiorari should continue to be prosecuted from the Court of Civil Appeals in cases where the Texas Supreme Court has refused writ of error. This inference is strengthened by the fact that in *Lone Star Gas Co. v. Texas*, 304 U.S. 224 (1938), this Court entertained an appeal from a Court of Civil Appeals in a situation in which the Texas Supreme Court had "refused" a writ. In both the *United* case and the *Lone Star* case, this Court directed its mandate to the Court of Civil Appeals and stated in such mandate that it had reviewed the judgment of the Court of Civil Appeals.

However, in *Sweatt v. Painter*, 339 U.S. 629 (1950), which was also a case in which the only action by the Texas Supreme Court was the refusal of a writ, this Court directed its writ of certiorari to the Supreme Court rather than to the Court of Civil Appeals. In addition, this Court directed its mandate to the Texas Supreme Court, and stated in such mandate that the judgment which it had reviewed was the judgment in which the Texas Supreme Court "refused" the application for writ of error.

The *Sweatt* case is the latest Texas case to come before this Court involving the refusal by the Supreme Court of Texas of a writ of error. In view of the fact that the writ of certiorari in that case was issued to the Texas Supreme Court, appellants felt that they could not, with safety, rely upon the prior cases in which appeals and writs of certiorari

have come from, or been directed to, the Courts of Civil Appeals. Hence, as a matter of precaution, appellants filed their appeals from the Supreme Court of Texas in the alternative to the appeals which they have filed from the Court of Civil Appeals. Precedent for such action is found in *Western Union Telegraph Co. v. Priester*, 276 U.S. 252 (1928). See also Stern & Gressman, Supreme Court Practice, p. 165.

Counsel for appellants do not interpret the action of this Court in the *Sweatt* case to reflect a change in view from the holdings made in former cases, particularly *United Gas Public Service Co. v. Texas*, 301 U.S. 667. They understand that in certiorari proceedings this Court has broad powers to require that records be transmitted to it, wherever those records may physically be; and assume that in the *Sweatt* case the Court considered that the record was still in the possession of the Supreme Court of Texas when it issued its writ to that Court.

It is, therefore, the view of appellants that under the holdings of this Court the proper appeals are those taken from the Court of Civil Appeals, Nos. 198 and 200, respectively.

Conclusion

As this Court stated in *Freeman v. Hewit*, 329 U.S. 249, 251 (1946): "The power of the States to tax and the limitations upon that power imposed by the Commerce Clause have necessitated a long, continuous process of judicial adjustment." While the court has not always been in agreement as to particular points close to the line, there has never been

disagreement with the conclusion that a tax imposed upon an instrumentality of transportation for the privilege of engaging in interstate commerce violates the very fundamentals upon which the Commerce Clause was founded. A more direct burden, a more sweeping regulation of national commerce, would be difficult to imagine.

For the reasons stated, the judgments of the Court below should be reversed and those of the District Court affirmed.

Respectfully submitted,

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APPENDIX

Copy of Section XXIII, H. B. 285, Chapter 402, Acts of the 52nd Legislature of Texas, 1951 (V.A.C.S. 7057f)

Art. 7057f. Occupation tax on business of gathering gas

Definitions

Section 1. The provisions of Texas Revised Civil Statutes (1925) Articles 10, 11, 12, 14, 22 and 23 and Texas Laws 1947, Chapter 359,[1] on the interpretation of Statutes shall apply specifically to this Section. In addition to these standard definitions, in this Section, unless the context otherwise requires:

(a) "Gas" means natural and casinghead gas or other gas taken from the earth or waters, regardless of whether produced from a gas well or from a well also productive of oil, distillate, condensate or other product.

(b) "Casinghead gas" means any gas or vapor indigenous to an oil stratum and produced from such stratum with oil.

(c) "Gathering gas" means the first taking or the first retaining of possession of gas produced in Texas for transmission whether through a pipe line, either common carrier or private, or otherwise after severance of such gas, and after the passage of such

[1] Article 23a.

gas through any separator, drip, trap, meter or other method designed to separate the oil therefrom. In the case of gas containing gasoline or liquid hydrocarbons that are removed or extracted at a plant within the State by scrubbing, absorption, compression or any other process, the term "gathering gas" means the first taking or the first retaining of possession of such gas for other processing or transmission whether through a pipe line, either common carrier or private, or otherwise after such gas has passed through the outlet of such plant.

(d) "Gatherer" means any person engaged in the gathering of gas.

(e) "Person" means and includes any person, firm, concern, receiver, trustee, executor, administrator, agent, institution, association, partnership, company, corporation, and persons acting under declarations of trust, as well as trustees acting under declarations of trust.

(f) "Cubic foot of gas" or "standard cubic foot of gas" shall have the definition ascribed thereto by Texas Laws, 1949, Chapter 519, Section 4, Texas Revised Civil Statutes (Vernon, 1948), Article 7047b, Section 2 (12).

Imposition of tax; amount; calculation

Sec. 2. In addition to all other licenses and taxes levied and assessed in the State of Texas, there is hereby levied upon every person engaged in gathering gas produced in this State, an occupation tax for the privilege of engaging in such business, at the

rate of 9/20 of one cent per thousand (1,000) cubic feet of gas gathered.

In determining the quantity of the gas for the purposes of calculating such tax, there shall be excluded (a) gas produced and then lawfully injected into the earth of this State; (b) gas used for fuel in connection with lease or field operations; (c) gas lawfully vented or flared; and (d) gas used in the manufacturing of carbon black.

Payment; penalty for delay

Section 3. The tax levied hereby shall be paid by the gatherers on the 25th day of each month on all gas gathered in the State during the next preceding thirty (30) days prior to the first day of the month in which payment is required to be made. If such payment is not made within the time prescribed, the amount due shall become delinquent and a penalty of ten per cent (10%) of the amount of the tax shall be added and such tax and penalty shall bear interest at the rate of six per cent (6%) per annum from date until paid.

Unlawful to require producer to pay

Sec. 4. The tax imposed by this Act is a tax on the occupation of gathering gas and not on the production of gas; therefore, it shall be unlawful for any gas gatherer to require any producer to pay the tax imposed under this Act under any contract provision between the producer and the gas gatherer allowing the gatherer to deduct from sums owed the

producer amounts paid by the gatherer by reason of the imposition of a tax on production.

Records and reports; rules and regulations

Sec. 5. It shall be the duty of each gatherer of gas in this State to keep accurate records within this State of all gas gathered and showing also what disposition is made of same, and to make reports to the Comptroller of Public Accounts of gas gathered upon forms prescribed by the Comptroller of Public Accounts. The Comptroller shall prescribe forms of reports to be made by such gatherers and to require that such reports be made on officially prescribed forms.

The Comptroller of Public Accounts shall have the power to prescribe such rules and regulations, and require such records and reports as may be needed to aid in the administration and enforcement of this Act.

Examinations and investigations; appropriation for administration and enforcement

Sec. 6. The Comptroller shall employ auditors and technical assistants for the purpose of verifying reports and investigating the affairs of gatherers to determine whether the tax is being properly reported and paid. He shall have the power to enter upon the premises of any taxpayer liable for a tax under this Act, and any other premises necessary in determining the correct tax liability, and to examine, or cause to be examined, any books, or records, of any person, subject to a tax under this Act, and to secure any

other information directly or indirectly concerned in the enforcement of this Act, and to promulgate and enforce, according to law, rules and regulations pertinent to the enforcement of this Act, which shall have the full force and effect of law. Before any division or allotment of the occupation tax collected under the provisions of this Act is made, one fifth (1/5) of one per cent (1%) of the occupation tax paid monthly as may be needed in such administration and such enforcement is hereby appropriated for such purpose.

Delinquency; injunction

Sec. 7. In the event any gas gatherer in this State shall become delinquent in the payment of the proper taxes herein imposed, or fails to file required reports with the Comptroller, the Attorney General by a suit in the name of the State of Texas shall have the right to enjoin such person from gathering gas until the delinquent tax is paid or said reports are filed, and the venue of any such suit for injunction is hereby fixed in the county where the offense occurs.

Violations; lien; ascertainment of amount due; gas audit fund; suits

Sec. 8. If any person shall violate any of the provisions hereof, he shall forfeit to the State of Texas as a penalty not less than Twenty-five Dollars ($25) for each violation and each day's violation shall constitute a separate offense. The State shall have a prior lien for all delinquent taxes, penalties, and interest on all property and equipment used by the

gatherer of gas in his business of gathering gas, and if any gatherer of gas shall fail to remit the proper taxes, penalties, and interest due, or any of them, the Comptroller may employ auditors or other persons to ascertain the correct amount due, and the gatherer of gas shall be liable, as an additional penalty, for the reasonable expenses or the reasonable value of such services of representatives of the Comptroller, incurred in such investigation and audit; provided, that funds collected for audits and examinations shall be placed in a gas audit fund in the Treasury and shall constitute a revolving fund which may be used from time to time by the Comptroller in making such audits in addition to the general appropriation made for such purpose, and all of said funds to be placed in said gas audit fund are hereby appropriated for such purpose. The Attorney General shall file suit in the name of the State of Texas for all delinquent taxes, penalties, and other amount due, and for the enforcement of all liens under this law; and the venue of any such suit is hereby fixed in Travis County.

Reports and audits as evidence; sale or transfer of agreements

Sec. 9. (a) If any person liable for the payment of the tax hereby levied, or required to remit the same to the Comptroller of Public Accounts, fails or refuses to pay any tax, penalty, or interest within the time and manner provided by the Act and it becomes necessary to bring suit or to intervene in any manner for the establishment or collection of said claim in any judicial proceedings, any report filed in

the office of the Comptroller by such gatherer or representative of said gatherer or a certified copy thereof certified to by the Comptroller showing the amount of gas gathered on which tax, penalties or interest have not been paid, or any audit made by the Comptroller or his representative from the books of said gatherer when filed and sworn to by such representative as being made from the records of said gatherer, such report or audit shall be admissible in evidence in such proceedings and shall be prima-facie evidence of the contents thereof; provided, however, that the incorrectness of said report or audit may be submitted in evidence only against the party by or from whom it was made.

(b) In the event the Attorney General shall file suit of claim for taxes, provided for in the foregoing, and attach or file as an exhibit any report or audit of said gatherer, and an affidavit made by the Comptroller or his representative that the taxes shown to be due by said report or audit are past due and unpaid and that all payments and credits have been allowed, then unless the party resisting the same shall file an answer in the same form and manner as required by Article 3736, Revised Civil Statutes of Texas of 1925, as amended by Chapter 239, Acts of the Regular Session of the Forty-second Legislature, said audit or report shall be taken as prima-facie evidence thereof, and the proceedings of said Article are hereby made applicable to suits to collect taxes hereunder.

(c) When any contract or agreement of gathering gas changes hands, the old gas gatherer shall note on his last report that said contract, or agreement has been sold or tranferred, showing the effect-

ive date of said change and the name and address of the person who will gather gas under said contract, or agreement and be responsible for the filing of reports provided for in this Act, and the new gas gatherer shall note on his first report that said contract, or agreement has been acquired, showing the effective date of said change and the name and address of the person formerly gathering gas under said contract, or agreement.

Disposition of collections

Sec. 10. All money derived from and collected by the State of Texas, under the provisions of this Act, less one-fifth (1/5) of one per cent (1%) as provided for in Section 6 hereof, shall be deposited in the State Treasury, in the proportion as follows: one-fourth (1/4) of the same shall go to and be placed to the credit of the Available Free School Fund; the remaining three-fourths (3/4) shall go to and be placed to the credit of the General Revenue Fund.

Invalidity as to interstate transmission; effect

Sec. 11. In the event the tax levied by this Section is declared unconstitutional or invalid by a court of competent jurisdiction as to gas gathered for interstate transmission, the tax shall not be levied as to gas gathered for intrastate consumption. *Acts 1951, 52nd Leg. p. 695, ch. 402, § XXIII.*

Emergency, Effective Sept. 1, 1951.